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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE CAPACITORS ANTITRUST
LITIGATION

MDL Case No. 3:17-md-02801-JD

Case No. 14-cv-03264-JD

THIS DOCUMENT RELATES TO:

Direct Purchaser Plaintiffs Action,
MDL Case no. 17-md-02801

Case No. 14-cv-03264-JD

**DEFENDANTS' NOTICE OF MOTION
AND MOTION TO STRIKE DPP PROFFER**

Date: February 27, 2020
Time: 11:00 a.m.
Judge: Judge: Hon. James Donato
Location: Courtroom 11

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT, on February 27, 2020, at 11:00 .m., or as soon thereafter as the matter may be heard, in the Courtroom of the Honorable James Donato, United States District Judge for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Defendants will and hereby does move for a motion to strike DPP Proffer.

This motion is based upon this Notice; the Memorandum of Points and Authorities in Support; and any further papers filed in support of this motion as well as arguments of counsel and all records on file in this matter.

Respectfully submitted,

Dated: February 25, 2020

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Earlier today, DPPs filed what they refer to as a “Proffer” that includes a 46-page brief
3 with 803 pages of attachments. DPPs’ “Proffer” should be stricken because it disregards their
4 legal burden and the process this Court has already ordered for ruling on these issues. (Pretrial
5 Order No. 2 for Direct Purchaser Plaintiffs’ Trial, MDL Dkt. No. 1140, at 2 (providing a process
6 for deciding “Coconspirator Statements and Fifth Amendment Invocations.”).) DPPs’ Proffer
7 rehashes at length the same arguments, and cites the same cases, as their prior oppositions to
8 Defendants’ Motions *in Limine* (“MILs”); the only difference is that DPPs’ Proffer exceeds the
9 Court’s three-page limit for MIL briefs more than tenfold.

10 The Court has already ruled on the MILs that DPPs rehash in their Proffer. In so ruling,
11 the Court clearly specified the procedure for addressing DPPs’ arguments regarding any particular
12 statement in any particular document in their 803-page appendices:

13
14 For co-conspirator statements, DPPs must file a proffer by 4:00 p.m. two trial
15 days before they intend to present them. For example, statements for Wednesday
16 must be filed by 4:00 p.m. on Monday. Statements for Monday must be filed by
17 4:00 p.m. on Thursday. The proffer must specify: (1) who made the statement; (2)
18 the substance of the statement; (3) the facts showing that the declarant was a co-
19 conspirator; and (4) the facts showing that the statement was made during and in
20 furtherance of the conspiracy. F.R.E. 801(d)(2)(E); *Bourjaily v. United States*, 483
21 U.S. 171 (1987). The Court will either file an order, or rule from the bench, before
22 the start of testimony.

23 (Pretrial Order No. 2 at 2, ¶ 1.) Nothing in the Court’s Order authorizes an 849-page filing six
24 days before the jury is seated.

25 Moreover, DPPs’ Proffer does not only ask for rulings on the co-conspirator exception to
26 hearsay; it asks the Court for a blanket ruling that all of the statements in all of the documents in
27 their 803-page appendices are admissible under some combination of (1) the Rule 801(d)(2)(E)
28 co-conspirator exception;¹ (2) as a Rule 801(d)(2)(a) statement of a party opponent;² (3) as a Rule

26 ¹ Proffer at 24-33.

27 ² Proffer at 33.

801(d)(2)(D) statement of an authorized agent;³ (4) as a Rule 803(6) business record;⁴ or (6) as self-authenticating under Rule 902.⁵ DPPs do not even say which of these five bases for admissibility they believe should apply to any particular statement found in any particular document.

DPPs' 849-page Proffer is not helpful to the Court or to the process of resolving the admissibility of any statement in any document. It does not tee up any particular issue for the Court to decide that the Court has not already decided or established a process for deciding. It does not provide the specific factual or legal bases for each offered statement that the Court ordered DPPs to provide, and which is legally required for any finding that a specific alleged conspirator (and in particular, AVX and/or KEMET) knowingly participated in DPPs' alleged conspiracy as of the date of a particular statement such that the co-conspirator exception could apply.⁶

It is not feasible or appropriate, in the few days left before trial, for Defendants to sift through 803 pages of documents—*none of which DPPs assert that they will actually use at trial*, much less when or with what witness—and show why *each* of the *five* bases for admissibility that DPPs cite in their Proffer do not apply to each of the potentially thousands of statements in the huge volume of documents submitted. Nor is it feasible (or even necessary given many of the documents may never be used at trial) for the Court to tease out which specific statements DPPs might wish to rely upon in each of those documents and then rule on all five asserted bases for admissibility for each statement. DPPs' Proffer is nothing more than a request for blanket relief from the burdens of the Federal Rules of Evidence. This Court has already ordered that they must follow the Rules as written with regard to each statement that they wish to proffer. (Pretrial Order No. 2 at 2, ¶ 1.).

³ Proffer at 34.

⁴ Proffer at 35.

⁵ Proffer at 36.

⁶ See Defendants' Omnibus Motion in Limine, Dkt. No. 1085, at MILs No. 7 and 8.

1 The Court should strike DPPs' Proffer and sustain its requirement that they meet their
2 evidentiary burden by complying with the process this Court already ordered.

3 Respectfully submitted,

4 Dated: February 25, 2020

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